IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 543 of 2005
With
CRIMINAL APPEAL No. 545 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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ABDUL RAUF RAMJUBHAI DHOBI & 2 - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MR LR PATHAN for Appellant(s) : 1 - 3.
MR RC KODEKAR, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA
and
HONOURABLE MR.JUSTICE MD SHAH
Date : 17/04/2006

COMMON CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. Both these appeals have been filed by the appellants who were arrested along with other

accused for the alleged commission of offences punishable under Secs.120-B, 121, 121(A) and 122 of IP Code, Sec.25(1)(aa)(e) of Arms and Secs.3(3), 20(1), 21(1) and 22 of POTA registered as DCB Police Station, Ahmedabad C.R.No.I-16 of 2003.

2. The short facts of the prosecution case are that a secret information was received by the Joint Police Commissioner, Ahmedabad, Mr.P.P.Pandey 15 days prior to filing of the complaint about entrusting the work of killing Dr.Jaydeep Patel, a VHP leader, to Zahidkhan Pathan, Junaid Saiyed and Harith Ansari by the local agent of Jaish-e-Mohammed at the instance of ISI. Harith Ansari and Junaid Saiyed were to keep a watch near the house of Jaydeep Patel at about 4.00 p.m. Hence, the police together with the informant and two panchas from Hotel Natraj went at the place of information after drawing necessary panchnama at 5.00 p.m. When they reached near

Galaxy Complex, on the informant showing two persons on Yamaha motorcycle, they were caught by the police of whom, one is named Harith and the other is named Mohmad Junaid from whom a pistol and five live cartridges were recovered. As the said pistol was alleged to have been supplied by Jahid, he was also arrested. It was learnt from Jahid that he was instigated by one Khalid of Hyderabad residing in Saudi Arabia when he came to Jaliwala Masjid in Ahmdabad for taking revenge of the post Godhra riots. Said Jahid was paid Rs.50,000/- by Khalid to kill leaders like Gordhan Zadafia, Mayaben Kodnani, Babu Bajrangi and Kamlesh Tripathi and was also told that he would be prepared to supply more money and weapons for that purpose. Jahid thereafter contacted his friends namely Sadabkhan, an absconding accused of a murder case and told him about the work assigned to him by Khalid. Jahid

thereafter asked Sadabkhan to find out young boys ready to carry out the said work for the sake of their community. Sabadkhan contacted Alimohammed @ Rajkumar, Mohammed Rafik and Abdul Rauf and told them about Jahid and his talk with Khalid. Hence a meeting was arranged by Sabadkhan with aforesaid persons and Jahid near a pan parlour in Juhapura area where Jahid described them about the plan of Khalid. He arranged the above persons for the task. He also contacted his friends Mohammed Junaid and Harith Shakeel Ahmed Ansari and they were also apprised of the work to be done by them. Thereafter, Jahidkhan, Sadabkhan, Harith, Mohammed Junaid, Mohammed Rafik, Abdul Rauf and witness Rajkumar met near Pan Parlour of one Mehboobbhai and were introduced each other and a plan was chocked out. Sadabkhan was assigned the work of collection of arms and ammunition by Jahidkhan. In the further meeting of Jahid

with Khalid at Mumbai, Khalid paid Rs.1.50 lakhs and agreed to supply arms and accordingly they kept a watch of the persons intended to be killed. Khalid told Jahid that he had participated in Akshardham incident and assault on Jaydeep Patel and VHP Leader. Jahid with the money of Rs.1.50 lakhs paid by Khalid purchased three pistols and cartridges through Sadabkhan. One pistol, five cartridges and his motor cycle were given to Junaid to keep watch on Dr.Jaydeep Patel. Rauf was given a pistol and cartridges and Yaseen of Visnagar was given Rs.10,000/- to purchase motor cycle. Jahid sent some boys for training in the terrorist camp. With the aforesaid allegations, the present complaint has been filed for the offences punishable under Secs.120-B, 121, 121(A) and 122 of IP Code, Sec.25(1)(aa)(e) of Arms and Secs.3(3), 20(1), 21(1) and 22 of POTA registered as C.R.No.I-16 of 2003 with DCB Police Station,

Ahmedabad.

3. In pursuance of arrest, initially the appellants preferred Cri. Misc. Appln. No.268 of 2004. However, same was rejected by the court below on 25-2-2004 without entering into the merits only on the ground that the investigation is going on and the charge sheet is yet not filed. Before the appellants challenge the above referred order by way of appeal, charge sheet was submitted on 5-3-2004 by the investigating agency. Therefore, the appellant Nos.1 and 2 of Criminal Appeal No.545 of 2005 and appellants Nos.1 and 2 of Criminal Appeal No.545 of 2005 preferred second bail application being Cri.Misc.Appln.No.786 of 2004. The same was also rejected vide order dated 22-4-2004 mainly on the ground of that being a successive bail application. Against the afore referred order, they preferred Criminal Appeal Nos.793 of 2004 and 792 of 2004.

However, both those appeals came to be withdrawn on 7-12-2004 with a liberty to file fresh bail application before the trial court. Since the appellants are in judicial custody for more than one year, the appellants preferred Cri.Misc.Appln.No.3791 of 2004 for bail under Sec.439 of the Code of Criminal Procedure read with Sec.49(7) of POTA. However, said application was also rejected by the learned Special (POTA) Judge by the impugned order dated 21-2-2005 giving rise for the applicants Nos.3,4 and 5 of Misc.Cri.Appln.No.3791 of 2004 to prefer Criminal Appeal No.543 of 2005 and applicant Nos.1 and 2 of Misc.Cri.Appln.No.3791 of 2004 to prefer Criminal Appeal No.545 of 2005.

4. We have heard Mr.L.R.Pathan, learned counsel for appellants-accused and learned Addl. Public Prosecutor, Mr.R.C.Kodekar, for the respondent-State.

5. As both the appeals have arisen from the same

order dated 21-2-2005 passed by the learned Special Judge (POTA) in Misc. Cri. Appln.No.3791 of 2004 (in POTA Case No.4 of 2004), they were heard together and are being decided by this common judgment.

6. It has been mainly argued by learned counsel for the appellants, Mr.Pathan, that the appellants were not arrested as mentioned by the prosecution. According to him, Harith Ansari was in police custody since 9-12-2003 on the pretext of interrogation while others were arrested prior in point of time. This fact has been informed by the accused in writing when they were produced before the learned Special POTA Court, Ahmedabad. It was further argued that the Special Court has totally ignored the basic principle of law of taking into consideration the evidence admissible and not the evidence inadmissible which even otherwise cannot be looked into at the stage of deciding the application for

bail. Trial court ought to have considered that in absence of any evidence on record, statement made by the accused is an inadmissible evidence. Further, court below ought to have decided the contention regarding admissibility of evidence and ought not to have postponed the same to be decided at the time of trial. According to him, statement made by the accused is not a statement before the Officer empowered under the law and there is also non-compliance of Sec.32(4) also and hence, it is an inadmissible evidence. It was further argued that law is settled on the point of statement of co-accused. Further more, court ought to have taken into consideration the judgment reported in 2003(4) Criminal Law Journal, 2994 Bombay. According to him, case reported in (1999)5 SCC page 253, a well known case of State Vs. Nalini(Rajiv Gandhi murder case), is not applicable in the present case as, in

the said reported case, only Rajiv Gandhi was targeted whereas in the present case, more than one person was targeted adopting the concept that the act does not amount to terrorized act. The trial court has committed a gross error by placing reliance on the statement of Rajkumar who is admittedly an accomplish and till now no procedure is adopted by the authority of pardoning this witness as provided under Sec.306 of the Code of Criminal Procedure. Court has also come to the wrong conclusion on the submission of prosecution that there is possibility of tampering with the evidence as witnesses are residing in the same area which, according to him, should not have been given much weight. It was further argued that seizure of arms from the appellant No.1 without any nexus of any criminal act cannot take the case within the purview of Sec.3(4) of POTA. Trial court has also ignored that Dr.Shakeel

Ahmed who is associated with IRCG had telephonic talk with the complainant P.I., Tarun Barot on 8th, 9th , 10th and 11th December, 2003 qua arrest of his son, who is one of the co-accused and others. It has also been argued that statement of Sadabkhan and others recorded by the concerned Officer was under threat of encounter and by using third degree method and hence, it was required to be discarded. It has also been argued that role attributed to the appellants do not fall within the definition of terrorized act as defined under POTA, 2002. Therefore, in view of the settled principles of law enunciated by the Honourable Apex Court, the impugned order is illegal, improper and unjust.

7. Learned APP, Mr.R.C.Kodekar, appearing on behalf of the State has mainly contended that restrictions imposed in Sec.49(7) of POTA would not apply in case of the appellants as the appeals for bail have been filed after

one year of arrest. It was further contended that conscious possession of arms is sufficient to bring the act within the purview of Sec.4 of POTA. According to him, if the confessional statement of an accused is admissible against the co-accused if it is involving himself and the co-accused. He also relied upon the case of State Vs. Nalini, (1999)5 SCC page 253 and contended that in that reported case, the target was only one person whereas in the case on hand, there were number of persons targeted. Further, it was held in the said reported case that admission of an accused is a substantive piece of evidence and it can be used against the co-accused also. However, the question of admissibility of confession or other things is not required to be considered at this stage. It was further contended that even if it is assumed that witness Rajkumar is an accomplish, as per

Sec.133 of the Evidence Act, he is a competent witness. He drew our attention towards recovery and discovery panchnamas, statement of police personnels and other witnesses. It was further contended that all the appellants and other accused were knowing about the conspiracy being hatched by Khalid, who is an absconding accused based in Saudi Arabia having link with ISI of Pakistan and Jaish-e-Mohammed and who paid Rs.50,000/- and other amounts to Jahidkhan in connection with their conspiracy. It was further contended that Jahid and Harit had arranged some boys to be trained by a terrorist organization in Pakistan and hence, their act can be said to be a terrorized act of creating terror among a particular community and its leaders. It was also contended that since arms were seized from the conscious possession of accused, no overt act is necessary to be kept in mind but provisions of Sec.120-B is to be

kept in mind. He has drawn my attention that in this case, charge sheet is filed since long and charge is also framed. Moreover, prosecution has examined various witnesses and now only few witnesses are to be examined and trial is likely to be over in near future. It was further contended that there is prima facie involvement of all the appellants in the serious offence and hence, if they are released on bail, they may try to threaten the witnesses and may not be available for trial.

8. Upon hearing the learned counsel appearing for the respective parties and on going through the well reasoned order passed by the court below together with the statements and other evidence shown to us by the learned counsel for the parties, it is established that case of the prosecution is based not merely on two confessional statements and the statement of Rajkumar but is supported by the

complaint itself wherein role of the appellants has been prima facie established. It further prima facie appears that 15 days prior to filing of the complaint, Joint Commissioner of Police had received specific information regarding the conspiracy hatched to kill Dr.Jaydeep Patel through young Muslim boys by the local agent of Jaesh-e-Mohmad at the instance of ISI of Pakisthan and hence, on verifying the same, Addl. Police Commissioner and Assistant Police Commissioner, Crime Branch, gave instructions to the complainant to act upon the said information and they started working on that. On the day of arrest of accused Junaid and Harith, Police Commissioner, Mr.Barot had received specific information from reliable informant that Harith and Junaid were to go at the place of Dr.Jaydeep Patel's residence to keep a watch with arms on hand. On receiving the said information, a watch was

arranged and they went to the place after preparing preliminary panchnama and the information received was found to be true and hence, the appellants were arrested on the spot and arms were recovered. This fact is also supported by the statement of Police Personnel who had gone there and also from the panchnama and, therefore, it cannot be said that the presence of present appellants very near to the house of Dr.Jaydeep Patel was a mere coincident. As such, previous information received by police personnel is found to be true and one of the appellants was found with a pistol and live cartridge. In these circumstances, there are reasons to believe that both Junaid and Harit had come at the place as per the conspiracy hatched and the plan chocked out in furtherance of the conspiracy. Even soon after the arrest of Junaid and Harith, arms were seized from the custody of other accused. It appears from the

panchnama and statement on record that it was possible in pursuance of interrogation of the above referred accused. So, it is prima facie established from the record that arms and ammunition were recovered from the conscious possession of the appellants and it was established on the basis of information given by them also. It is revealed that arms have been seized in a notified area. Sec.4 of POTA provides that where any person is in unauthorized possession of any arms or ammunitions specified in column Nos.2 and 3 of category 1 or category 3(a) of Schedule 1 to the Arms Rules, 1962, in a notified area, he shall be guilty of terrorist act and shall be punishable with imprisonment for life and also with fine. Thus, there is specific provision making mere possession of an unauthorized arms in a notified area guilty of terrorized act. Even mere possession is sufficient to bring the act within the ambit

of Sec.4 of POTA. It is required to be noted that all the contentions raised by the learned counsel for the appellants here have been dealt with properly by the court below. For coming to the specific conclusion, court below has also taken into consideration the well known judgment on this issue.

9. After discussing the evidence on record and on going through the judgment in question, it appears to us that the court below has rejected the bail applications of the appellants keeping in mind the evidence on record and also keeping in mind the role alleged by the prosecution against the present appellants and, therefore, it cannot be said that the judgment and order passed by the court below is illegal, unjust and improper and can also not be said to be based only on statement of co-accused. On the contrary, there are ample evidence on record connecting the appellants with the crime in

question. Moreover, their role is such which also take them very near to the crime in question. Not only that, one of the accused was having deadly weapons in his possession along with live cartridges and the accused were found from very near to the house of Dr.Jaydeep Patel. From that also, it can be inferred that it was a part of conspiracy and the secret information received turned out to be true. Once presence of the appellants has been prima facie established at the relevant time coupled with their arrest on the spot along with deadly weapons and which is supported by the ample prima facie evidence on record, keeping in mind the serious nature of the offence alleged against the accused and also the period of sentence prescribed in such offence, if the appellants are released on bail, they may not be available for trial and may even try to threaten the witnesses. Since all the contentions raised by the

learned counsel for the appellants have been properly dealt with by the court below in the elaborate judgment, we are not repeating the same here again.

10. In the entirety of facts and circumstances narrated hereinabove coupled with the facts that charge sheet is filed since long, even charge is also framed, various witnesses have been examined by the prosecution and only few witnesses are remained to be examined and it has become part heard matter and trial is expected to be completed in near future and hence, we are of the opinion that the appellants are not required to be released on bail. These appeals are therefore required to be rejected.

11. Both the appeals are accordingly rejected.

12. Since the observations by this Court in this judgment being made for the purpose of deciding these appeals, same may not prejudice the parties in trial.

13. Office to place a copy of this judgment in each matter.

(R.P.DHOLAKIA,J.)

(M.D.SHAH, J.)

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